Washington Law Review

Volume 58 | Number 4

11-1-1983

Sufficiency of a Separation Agreement for Tax Purposes—Jacklin v. Commissioner, 79 T.C. 340 (1982)

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SUFFICIENCY OF A SEPARATION AGREEMENT FOR TAX PURPOSES—*Jacklin v. Commissioner*, 79 T.C. 340 (1982)

In *Jacklin v. Commissioner*,[1] the Tax Court addressed a dispute concerning the deductibility of alimony payments under a separation agreement that did not specify a dollar amount. Under this agreement, the payor spouse was to pay to the recipient spouse whatever funds were necessary to sustain the standard of living which she had previously enjoyed. The court held that this agreement was sufficiently precise under section 71(a)(2) of the Internal Revenue Code to allow the payor spouse to deduct the payments.[2]

This Note explores the legal tensions created by the court's decision. It asserts that the decision blurs the line between voluntary and obligatory payments and creates practical problems for all concerned. The Note then addresses the court's primary reason for its decision: its fear that the requirement of a specific dollar amount of alimony would be a trap for the unwary.[3] Finally, it proposes that the problems created by the *Jacklin* decision can be resolved by requiring the separation agreement to state a dollar figure for support.

I. LEGAL BACKGROUND

A. *Statutory Background*

To give effect to our system of progressive tax rates, the income tax laws generally prohibit the transfer of income from a higher-bracket taxpayer to a lower-bracket taxpayer.[4] An exception to this prohibition was

1. 79 T.C. 340 (1982).

2. Before the payor spouse can qualify for a § 215 deduction, the recipient spouse must come within § 71 and thus be required to include the payment in gross income. 26 U.S.C. §§ 71, 215 (1976) [26 U.S.C. hereinafter cited as I.R.C.].

3. 79 T.C. at 351.

4. Phillips, *"Separated" Under State Law May Not Be "Separated" for Purposes of the Section 215 Deduction And Section 71 Inclusion*, TAXES, Oct. 1982, at 720, 721. *See* Lucas v. Earl, 281 U.S. 111, 114–15 (1930) (case decided prior to the advent of the joint return); J. FREELAND, S. LIND & R. STEPHENS, FUNDAMENTALS OF FEDERAL INCOME TAXATION 269, 270 (4th ed. 1982).

Even an attempt to make such a transfer before the transferor has actually received a payment will not be successful. If a transferor retains any control over the transfer of a payment he or she will be held to have income. Helvering v. Horst, 311 U.S. 112 (1940). Only in an extreme case where the transferor refuses to receive a payment altogether and makes no stipulations regarding the disposition of the money will the court hold that the transferor has not received income. Commissioner v. Giannini, 129 F.2d 638 (9th Cir. 1942). *See also* Rev. Rul. 74-581, 1974-2 C.B. 25 (amounts received for services performed by a faculty member under a clinical program which are turned over to the university are not income to the faculty member). *See generally* Note, *Disclaimers in Federal Taxation*, 63 incorporated into the Code in 1942 to allow income-splitting between divorced or separated spouses when specific requirements are met.[5]

Prior to the Revenue Act of 1942,[6] payments made pursuant to a separation or divorce were neither taxable to the recipient[7] nor deductible by the payor.[8] The payor spouse thus was taxed on income he or she could not use.[9] As wartime tax rates soared, this burden on the payor spouse often became unbearable.[10]

In 1942, Congress remedied this economic burden by creating an inclusion/deduction method for treatment of alimony.[11] The statutory predecessors of section 71(a)(1) and section 215 provided for the inclusion of alimony in the income of the recipient spouse and granted a corresponding deduction to the payor spouse.[12] To qualify under the 1942 provi-

HARV. L. REV 1047 (1950) (discussing the tax consequences that follow from the property doctrine that a transfer is not complete until accepted by the intended recipient).

5. Revenue Act of 1942, Ch. 619, 56 Stat. 798 (codified at I.R.C. §§ 22k, 23u (1942), *superseded by* I.R.C. §§ 71, 215 (1976)).

6. *Id.*

7. Gould v. Gould, 245 U.S. 151 (1917) (holding that alimony paid to a recipient spouse should be excluded from gross income).

8. Prior to 1942 the Code contained no statutory provisions allowing deductions for alimony payments made by the payor spouse. 1 A. KRAGEN & J. MCNULTY, FEDERAL INCOME TAXATION 872 (3d ed. 1979). Without specific authorization by the Code, no deduction is allowed because a taxpayer has no constitutional right to a deduction. J. FREELAND, S. LIND & R. STEPHENS, *supra* note 4, at 351.

9. The payor spouse could possibly avoid paying income tax by utilizing an "alimony trust" if under that state's laws the obligation to support could be discharged in a lump sum payment. Helvering v. Fuller, 310 U.S. 69 (1940). This option was unavailable, however, if local laws prohibited such a discharge, the payor spouse lacked capital, or the recipient spouse refused to agree to such a payment. 3 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS 77-3 (1981).

10. *Id.*; A. GUNN, FEDERAL INCOME TAXATION 184 (1981).

11. H.R. REP. NO. 2333, 77th Cong., 2d Sess. 71, 72 (1954).

The constitutionality of the 1942 provisions was challenged in Mahana v. United States, 88 F. Supp. 285 (Ct. Cl.), *cert. denied*, 339 U.S. 978 (1950). The challenge was based on the Supreme Court's holding in *Gould v. Gould* that alimony was not income to the recipient spouse. The *Mahana* court rejected this challenge because the Supreme Court in *Gould* was deciding a question of statutory interpretation and not of constitutionality. The constitutionality of the 1942 provisions has never been addressed by the Supreme Court, but commentators consider it settled. *See* 3 B. BITTKER, *supra* note 9, at 77-4.

12. I.R.C. § 22k (1942) (*superseded by* I.R.C. § 71 (1976)) provided that periodic payments should be included in the recipient spouse's gross income if they were received by the recipient spouse after a decree of divorce or legal separation, and if the payor spouse made them to discharge a legal duty imposed under the decree. I.R.C. § 23u (1942) (*superseded by* I.R.C. § 215 (1976)) allowed a deduction to the payor spouse for payments that were included in the recipient's income under I.R.C. § 22k. The effect of these provisions is continued in I.R.C. §§ 71, 215 (1976).

As a result, the payor spouse is not taxed on income that he or she has earned, because the tax originally paid on such income is returned as a deduction. Occasionally, however, the inclusion/deduction scheme can create tax liability by taxing the recipient spouse on payments made by the payor spouse even though the payor spouse has no taxable income to be offset by the deduction. *See* Neeman v. Commissioner, 26 T.C. 864 (1956), *aff'd*, 255 F.2d 841 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958).

sions, the parties were required to be divorced or legally separated.[13] These requirements were intended to prevent a married couple from avoiding tax liability by entering into an informal separation and filing separate returns.[14]

The advent of the income-splitting joint return in 1948[15] enabled Congress to expand its treatment of alimony under the inclusion/deduction provisions. By enacting section 71(a)(2) in the Revenue Act of 1954,[16] Congress made the deduction/inclusion scheme available to a husband and wife who had separated without a court decree.[17]

B. *Scope of the Inclusion/Deduction System*

The inclusion/deduction mechanism permits separated parties to allocate taxes between themselves through payments for support.[18] Under

13. I.R.C. § 22k (1942) (*superseded by* I.R.C. § 71 (1976)) (requiring a decree of divorce or of separate maintenance).

14. Prior to the advent of the joint return, a married party's income was attributed solely to that party and was not split between the two spouses. Thus a married couple with one primary wage-earner would pay more tax, due to progressive tax rates, than a divorced couple who, after 1942, was allowed to split its income through use of the inclusion/deduction system. 3 B. BITTKER, *supra* note 9, at 77-5.

15. "Income splitting" between spouses was incorporated into the Internal Revenue Code by the Revenue Act of 1948, Pub. L. No. 471, 62 Stat. 110 (codified at I.R.C. § 1(a) (1976)), to equalize treatment of spouses in the community. This Act provided that a husband and wife could, at their option, split their combined income in half for purposes of calculating their income tax. This provision equalized tax treatment of married couples with the same total income regardless of the division of that income; however, it also gave a substantial tax advantage to married couples filing jointly over single taxpayers. At some income levels a single person's tax was 42.1% higher than the tax paid by a married couple filing jointly. In an attempt to remedy this situation Congress passed a lower tax schedule for single taxpayers in 1969. 1 A. KRAGEN & J. MCNULTY, *supra* note 8, at 820–23; S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION 1272–76 (1972). *See also* 3 B. BITTKER, *supra* note 9, at 111.33–.36 (discussing married couples—joint vs. separate returns).

16. Internal Revenue Code of 1954, Pub. L. No. 591 ch. 736, 68A Stat. 19 (1954) (codified at I.R.C. § 71(a)(2) (1976)). The section reads as follows:

> Alimony and separate maintenance payments.
>
> (a) General rule.
>
> . . . .
>
> (2) Written separation agreement.
>
> If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of [the 1954 Code], the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

17. H.R. REP. No. 1337, 83d Cong., 2d Sess. 9–10 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 10 (1954).

18. I.R.C. § 62(B) provides that the alimony deduction authorized by § 215 is a deduction from

this system, the parties choose initially how much income to transfer.[19] Once this choice is made and incorporated into a separation agreement, the parties are bound.[20]

To qualify under section 71(a)(2) several requirements must be met:[21] (1) The parties must be separated,[22] (2) the parties must have executed a written separation agreement after August 16, 1954,[23] (3) the payments

gross income. This provision ensures that the payor spouse, whether or not he or she itemizes, is merely a conduit through which income passes to the recipient spouse. 3 B. BITTKER, *supra* note 9, at 77-22 to -23. *See also supra* note 11 (explaining how the inclusion/deduction scheme can actually create additional tax liability).

19. The general rule, in determining whether a payment is alimony, is that the court is not bound by the labels the spouses attach to the payment. Beard v. Commissioner, 77 T.C. 1275 (1981); Schottenstein v. Commissioner, 75 T.C. 451 (1980); Westbrook v. Commissioner, 74 T.C. 1357 (1980); Warnack v. Commissioner, 71 T.C. 541 (1979); Mirsky v. Commissioner, 56 T.C. 664 (1971). Under the guidance of a competent tax lawyer, however, the parties can usually structure their payments so as to choose on whom the tax burden will fall.

20. Modification of an agreement is controlled by state law. A separation agreement that is not incorporated into a court decree can be modified by agreement of the parties like any other contract. Note, *Specific Performance of Separation Agreements—A New Remedy:* Moore v. Moore, 12 N.C. CENT. L.J. 207, 211 (1980). If after entering into the separation agreement, either party petitions the court for dissolution of marriage, a decree of legal separation, or a declaration of invalidity of the marriage, the terms of the existing separation agreement, except for provisions of custody, support, and visitation of children, will be binding on the court unless the court finds that the separation agreement was unfair. UNIF. MARITAL DISSOL'N ACT § 306(b) (1973); WASH. REV. CODE § 26.09.070(3) (Supp. 1982). Once the terms of the separation agreement are incorporated into a court decree, modification is subject to the more stringent control of the UNIF. MARITAL DISSOL'N ACT § 316(a), which provides that the provisions of any decree respecting maintenance or support may be modified only on a showing of a substantial change of circumstances. *See also* WASH. REV. CODE § 26.09.170 (Supp. 1982) (modification of decree for maintenance or support). The Washington courts have interpreted a substantial change of circumstances to mean circumstances that were not within the contemplation of the parties when the decree was entered. McKendry v.McKendry, 2 Wn. App. 882, 472 P.2d 569 (1970). *See also* Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 735 (an analysis of the law surrounding modification of spousal support); Note, *Modification Due to Changed Circumstances*, 20 WASHBURN L.J. 66 (1980) (analysis of the law on modification of future alimony payments due to changed circumstances).

21. Mavity v. Commissioner, 341 F.2d 865, 867 (2d Cir. 1965).

22. The IRS has taken the position that a husband and wife are not separated for purposes of § 71 if they share the same accommodations. Sydnes v. Commissioner, 68 T.C. 170 (1977) (trial court following IRS position, holding that spouses continuing to share common residence were not separated within meaning of § 71(a)(3)), *rev'd*, 577 F.2d 60 (8th Cir. 1978). This position conflicts with state statutes that recognize a period of separation, even when the parties are sharing the same accommodation. Two recent cases appear to be in conflict on the proper interpretation of the separation requirement. *Compare* Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978) (holding that the requirement that parties be separated may be met as a factual matter even though the parties are living under the same roof) *with* Washington v. Commissioner, 77 T.C. 601 (1981) (no § 215 deduction allowed because the couple was living in the same house and therefore was not separated within the meaning of § 71(a)(3)). *See generally* Phillips, *supra* note 4 (arguing that "separated" for purposes of compliance with §§ 71 and 215 should include parties living under one roof).

23. Payments made pursuant to pre-1954 agreements, which have been amended or further negotiated after 1954, have been held by the courts to fall within this provision. Mavity v. Commissioner, 341 F.2d 865 (2d Cir. 1965) (holding that payments made pursuant to a pre-1954 agreement, in settlement of arrearages in alimony owed under a 1954 separation agreement, are within the provision

must have been made under the agreement and based on the family relationship, (4) the payments must be periodic, (5) the payments must be received after the execution of the agreement, and (6) the parties must have filed separate tax returns for the year in question. A payor spouse can utilize the deduction authorized by the mechanism only if he or she falls squarely within its requirements.[24] As these requirements illustrate, this mechanism is not intended to apply to all payments between spouses.[25] It applies only to periodic payments[26] made pursuant to a decree of divorce or a separation agreement and motivated by the marital or family relationship.[27]

The inclusion/deduction mechanism does not include voluntary payments.[28] As a general rule, a voluntary payment must be included in the

of § 71(a)); Turpin v. United States, 240 F. Supp. 171 (W.D. Miss. 1965) (holding that payments made pursuant to a pre-1954 separation agreement are deductible).

24. Alexander III v. Commissioner, 38 T.C.M. (CCH) 969, 970 (1979). *See* Taylor v. Commissioner, 55 T.C. 1134, 1138 (1971). The *Taylor* court found that "Congress, at all times since the conception of section 22(k) of the Revenue Act of 1939, has been unwilling to change the long-standing rule regarding the nontaxability and nondeductibility of alimony payments . . . except where certain formal actions were involved." *Id.* at 1138. The court recognized that the addition of § 71(a)(2) and § 71(a)(3) liberalized the long-standing rule, but noted that even this liberalization applied only where there was "a *written* agreement or a court decree which *required* certain payments to be made." *Id.* The court provided further that Congress did not "extend that liberalization to all arrangements for support payments." *Id.*

25. *See* Garner v. Commissioner, 32 T.C.M. (CCH) 353, 356 (discussion of purpose of § 71(a)(2) and its limitations). Section 71(b) provides expressly that "[s]ubsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix . . . for the support of minor children."

26. I.R.C. § 71(a)(2). This section provides that periodic payments do not have to be made at regular intervals. I.R.C. § 71(c) further qualifies the term periodic payments by providing that installment payments discharging an obligation, "the principal sum of which is . . . specified," are not periodic payments unless the principal sum is to be paid "over a period ending more than 10 years from the date of such decree, instrument, or agreement." If periodic payment treatment is authorized for payments on a principal sum extending beyond 10 years, "the installment payments shall be treated as periodic payments . . . (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum." Payments that are subject to certain contingencies are also considered periodic. Treas. Reg. §§ 1.71-1(d)(3) to (4) (1954). *See generally* 3 B. BITTKER, *supra* note 9, at 77-13 to -15 (discussing the periodic payment requirement); Kuntz, *Simplification of the Definition of Periodic Payments In Internal Revenue Code Section 71*, 47 CIN. L. REV. 213 (1978) (arguing that the present method of determining tax consequences of divorce or separation payments is unsatisfactory).

27. This phrase has been interpreted by the regulations to mean "the general obligation to support" and does not encompass payments settling property rights. Treas. Reg. §§ 1.71-1(b)(4), -1(c)(4) (1967); Warnack v. Commissioner, 71 T.C. 541 (1979) (extensive review of cases focusing on the distinction between payments for support and payments in exchange for a release of property interest). *See generally* Hjorth, *Tax Consequences of Post-Dissolution Support Payment Arrangements*, 51 WASH. L. REV. 233, 238–46 (1976) (distinguishing deductible support payments from nondeductible property purchases).

28. The courts have repeatedly held that voluntary payments are not deductible. Manupello v. Commissioner, 35 T.C.M. (CCH) 1024 (1976) (payments not made pursuant to a written separation agreement were voluntary and therefore nondeductible); Blanchard v. United States, 424 F. Supp.

recipient's gross income. Gross income is presently defined as "all income from whatever source derived."[29] The nebulous concept of gross income has been refined through both judicial interpretation and statutory amendment.[30] The Supreme Court has interpreted this definition to include all "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[31] This definition clearly encompasses voluntary payments.

A voluntary payment does not come within the inclusion/deduction mechanism. Therefore the payor spouse will generally be taxed when she or he acquires the sum and will not be afforded a deduction for a voluntary payment.[32]

C. *Judicial Interpretation of the Written Separation Agreement Requirement*

The term "written separation agreement" is not defined in the Code or the regulations.[33] The regulations do provide, however, that such an agreement need not be legally enforceable,[34] and that it should specifi-

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916 (D. Md. 1976) (holding that husband's voluntary increase of payments to ex-wife prior to judicial modification was nondeductible); Taylor v. Commissioner, 55 T.C. 1134 (1971) (payments made prior to separation decree were not deductible); Hoffman v. Commissioner, 54 T.C. 1607, 1613 (1970) (payor spouse's legal obligation to make payments terminated upon recipient spouse's remarriage; thus payments did not come within § 71(a)(1)), *aff'd per curiam*, 455 F.2d 161 (7th Cir. 1972); Herrmann v. Commissioner, 23 T.C.M. (CCH) 429 (1964) (voluntary payments made by the payor spouse to cover payee's income tax were nondeductible).

29. I.R.C. § 61(a) (1976).

30. In 1917, the Supreme Court held that alimony received by a divorced spouse under a court decree was not subject to income tax under the Revenue Act of 1917, which defined income as "gains or profits and income derived from any source whatever." Gould v. Gould, 245 U.S. 151 (1917). In 1920, the Supreme Court went even further by holding that the sixteenth amendment applied only to "gain derived from capital, from labor, or from both combined." Eisner v. Macomber, 252 U.S. 189, 207 (1920). After the enactment of the predecessors of § 71(a) and § 215 in 1942, however, the Court of Claims upheld the taxability of alimony. Mahana v. United States, 88 F. Supp. 285, 288 (Ct. Cl.), *cert. denied*, 339 U.S. 978 (1950). Section 61(a) of the present code expressly includes alimony as income. *See also* 3 B. BITTKER, *supra* note 9, at 77-2 to -5 (discussing the history of the tax treatment of alimony).

31. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

32. Lucas v. Earl, 281 U.S. 111 (1930). This principle is necessary to effectuate the progressive tax rate underlying our federal tax system. A progressive tax is one that "applies higher rates progressively as the taxable amount increases." BALLENTINE'S LAW DICTIONARY 1006 (3d ed. 1969). Such a tax obviously provides strong inducement for a higher bracket taxpayer to assign income to a lower bracket taxpayer. The effect of such an assignment would be to lower the total amount of tax collected. J. FREELAND, S. LIND & R. STEPHENS, *supra* note 4, at 269–270.

33. Jacklin v. Commissioner, 79 T.C. 340, 346 (1982); Bogard v. Commissioner, 59 T.C. 97, 100 (1972).

34. "Written Separation Agreement. . . . Such payments are includable in the wife's gross income whether or not the agreement is a legally enforceable instrument." Treas. Reg. § 1.71-1(b)(2)(i) (1954).

cally state the obligation to support.[35] Most litigation has centered around the scope of the "writing" requirement. Not surprisingly, the courts have held that a purely oral agreement is insufficient.[36] Even if there is some related writing the courts have generally found that it is insufficient to qualify the agreement as "written" for purposes of section 71(a)(2) of the Internal Revenue Code.[37]

A few Tax Court decisions have considered the degree of specificity contemplated by the term "separation agreement." In *Bogard v. Commissioner*,[38] the parties executed a written separation and support agreement that failed to state explicitly that the parties would live apart.[39] As a result, the Commissioner challenged the sufficiency of the agreement under section 71(a). The *Bogard* court held that the agreement was not insufficient as a matter of law and that the parties therefore had the right to prove actual separation.[40] The court reasoned that a contrary decision would "elevate form over substance" and create a "snare" for the "unwary or uninformed."[41]

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35. "Section 71(a) applies only to payments made because of the family or marital relationship in recognition of the general obligation to support which is made specific by the decree, instrument, or agreement." Treas. Reg. § 1.71-1(b)(4) (1954).

36. Harry L. Clark, 40 T.C. 57 (1963); Alexander III v. Commissioner, 38 T.C.M. (CCH) 969 (1979); Manupello v. Commissioner, 35 T.C.M. (CCH) 1024 (1976).

37. Greenfield v. Commissioner, 47 T.C.M. (PH) 1565 (1978) (letters written by the payor spouse are insufficient to qualify an agreement as written because they are merely unilateral offers); Auerbach v. Commissioner, 34 T.C.M. (CCH) 948 (1975); Garner v. Commissioner, 32 T.C.M. (CCH) 353 (1973); Hill v. Commissioner, 59 T.C. 837 (1973); Kraskow v. Commissioner, 23 T.C.M. (CCH) 1414 (1964) (transcript of courtroom proceeding in separation action insufficient to qualify agreement as written under § 71(a)(2)).

38. 59 T.C. 97 (1972).

39. The Bogard agreement read:

July 29, 1965

Until we see a lawyer, following is our agreement:

(1) As agreed, you will give me $630 per month which will cover rent, food and general living expenses and psychiatric treatment (50 per week) which will be discontinued when treatment stops.* Should rent increase you will increase monthly allotments accordingly.

(2) You will increase our life insurance by $25,000 with me as principal beneficiary.

(3) You will keep car, piano and your books, I will keep money in the bank.

(4) You are responsible for medical and dental expenses for David and me.

(5) You will pay for David's Summer Camp.

(6) You agreed to give me additional money when you have it for clothing and will be responsible for David's clothing.

Signed: Howard M. Bogard

Signed: Bridget Bogard

BB * at termination of psychiatric treatment monthly payments will be decreased to $478–$520—a month which will include rent, living expenses, telephone, & clothing for Bridget. HB

Id. at 99.

40. *Id.* at 101, 102.

41. *Id.* at 101.

In *Jefferson v. Commissioner*,[42] the court held that a written separation agreement[43] lacking a fixed dollar amount was sufficient for purposes of the statutory predecessors of section 71(a)(1).[44] The agreement required a minimum payment of $6000, to be increased if the recipient spouse's condition changed or if it was needed for any other reason.[45] The Commissioner argued that the payments[46] were gratuitous.[47] The court rejected this argument because the payor spouse was legally obligated to pay $6000 per year or more for the support of the recipient.[48]

These two cases provided the foundation for the Tax Court's decision in *Jacklin v. Commissioner*.[49]

II. THE *JACKLIN* DECISION

Dewey Rivkin and Patience Jacklin were married in 1965 in Arlington, Virginia.[50] They separated in 1973 and signed a written separation agreement.[51] This agreement provided for support payments to Patience suffi-

42. 13 T.C. 1092 (1949).

43. Arguably, this instrument, which was a letter written by the payor spouse, would also encounter problems with the rule that a letter written by one spouse is merely a unilateral offer. *See* cases cited *supra* note 37. The *Jefferson* court did not address this issue.

44. The *Jefferson* case arose under the predecessor to I.R.C. §§ 71(a) and 215, which was I.R.C. §§ 22k & 23u (1942). *See supra* note 12.

45. The text of the letter containing the agreement read:

> May 20, 1941.
>
> Dear Violet,
>
> . . . .
>
> Accordingly, I now confirm, as I promised you on our trip that I would, that if the divorce is granted, I am bound to pay, in December of each year thereafter, to you or, if you should find it more convenient or agreeable, to Jeff, as a sort of agent or trustee for you, a sum sufficient, according to the full measure of the standard of living to which you have been accustomed, to cover all amounts required for your suitable maintenance, support and comfort during each year. In your present condition of health, six thousand dollars a year would seem to be sufficient; but should a larger amount be required by reason of improvement in your condition or for any other reason, my agreement covers the increase.
>
> . . . .
>
> Affectionately,
>
> [Sig.]

Jefferson v. Commissioner, 13 T.C. 1092, 1094–95 (1949).

46. In 1942, the payor spouse paid the recipient $4217; in 1943, $4813.14. Neither of these amounts was included in the gross income of the recipient. *Id.* at 1095.

47. *Id.* at 1097.

48. *Id.* at 1098–99.

49. 79 T.C. 340 (1982).

50. *Id.* at 341.

51. Patience conceded, for purposes of the motion for summary judgment only, that she had executed the agreement. *Id.* at 341 n.2.

cient to maintain the standard of living to which she had been accustomed during her marriage.[52]

The amount Patience included as income from support payments was significantly less than the amount Dewey deducted as payments for support.[53] To insure that the payments were treated consistently and to protect revenue, the Internal Revenue Service sent deficiency notices to both Patience and Dewey.[54] In actions contesting the deficiencies, the Commissioner of Revenue joined with Patience in a motion for summary judgment.[55] Patience and the Commissioner argued that the payments were not deductible by Dewey under section 215 because the separation agreement was insufficient as a matter of law under section 71(a)(2).[56] The court rejected this argument.[57]

The court first reviewed the applicable statutory and regulatory provisions.[58] The regulations require that a separation agreement state the payor spouse's obligation to support;[59] however, the regulations also provide that such support payments are to be included in the recipient's gross income whether or not the agreement is enforceable.[60]

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52. The text of paragraph 5 of the separation agreement in *Jacklin* read:

> (5) The Husband shall pay the Wife for her assistance and maintenance whatever supplementary funds are necessary to sustain a standard of living equivalent to that which obtained before the separation. The Wife intends to work and be independent. If the Wife ceases to work, payment will increase to meet the needs of the Wife. The payments will be at least quarterly and will continue until one of the following events should first occur: (a) the death of the Husband; (b) the remarriage of the Wife; (c) the death of the Wife.

Id. at 342.

53. On his 1975 tax return Dewey deducted $24,379.20, while on her return Patience included $14,400 as alimony received from Dewey. *Id.* at 343.

54. In the deficiency notices, the Internal Revenue Service disallowed the entire deduction claimed by Dewey for support payments and also increased Patience's alimony income to equal the amount originally deducted by Dewey. *Id.* at 344.

55. For purposes of the motion for summary judgment, the parties stipulated that they were living apart as of 1973, that they executed the written separation agreement in 1973, that Dewey made payments in 1975 totaling $24,379.20 under the agreement, that Dewey's payments were periodic, and that the payments were made because of the marital or family relationship. Thus all of the requirements under § 71(a)(2) were fulfilled, aside from the issue of whether the agreement must specify a dollar amount of support. *Id.* at 345.

56. *Id.* at 345–46.

57. *Id.* at 348–49.

58. The court reviewed the provisions of I.R.C. § 71(a)(2) and the treasury regulations pursuant to § 71(a)(2), specifically Treas. Reg. §§ 1.71-1(b)(2), -1(b)(4) (1954).

59. *Jacklin*, 79 T.C. at 346–47 (citing Treas. Reg. § 1.71-1(b)(2) (1954)).

60. *Id.* at 347 (citing Treas. Reg. § 1.71-1(b)(2) (1954)). Treas. Reg. § 1.71-1(b)(2) (1954) provides that a separation agreement does not have to be enforceable to be sufficient for purposes of § 71(a)(2). This provision was incorporated into the regulations directly from the legislative history, which further provides that uniformity is intended in the treatment of alimony, "regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony." S. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942), *reprinted in* 1942-2 C.B. 568. Thus, considering the legislative history as a whole, the concurring judge in *Jacklin* found that "Congress

The IRS and Patience argued that the absence of a stated amount of support demonstrated the lack of a sufficient separation agreement as required by section 71(a)(2).[61] They relied on prior cases in which oral agreements and a letter signed by only one party were held to be insufficient to satisfy the written separation agreement requirement.[62] The court rejected the application of these decisions because the written agreement in the *Jacklin* case had been signed by both spouses.[63] The court turned instead to two cases it found more applicable.

The court found guidance in *Jefferson v. Commissioner*,[64] though it did not view it as directly on point.[65] Unlike the *Jacklin* agreement, the *Jefferson* agreement had named a minimum payment.[66] The court emphasized, however, that the *Jacklin* agreement provided some standard for determining the necessary amount of support.[67] The agreement required that Dewey pay Patience "for her assistance and maintenance whatever supplementary funds are necessary to sustain a standard of living equivalent to that which obtained before the separation."[68]

The court also found support in the "somewhat analogous case"[69] of *Bogard v. Commissioner*.[70] In *Bogard*, the existence of the agreement itself as a "separation" agreement had to be determined.[71] In *Jacklin*, the nature and amount of the payments needed to be resolved. The court adopted the concerns of the *Bogard* court that a contrary decision would elevate form over substance and constitute a trap for the unwary.[72]

was concerned with oddities of State laws" and did not intend that "payments made by one spouse to another under an instrument wholly unenforceable under normal rules of contract law were intended to be deductible by the payor and taxable to the payee." 79 T.C. at 353–54 (Whitaker, J., concurring).

61. 79 T.C. at 347–48.

62. Patience and the IRS cited Saniewski v. Commissioner, 38 T.C.M. (CCH) 1295 (1979) (letter written to recipient spouse by payor spouse is unilateral offer of support and not a written separation agreement); Auerbach v. Commissioner, 34 T.C.M. (CCH) 948 (1975) (oral agreement is insufficient to qualify as a written separation agreement); Garner v. Commissioner, 32 T.C.M. (CCH) 353 (1973) (documents offered were merely references to an oral agreement and failed to constitute a written separation agreement). *Jacklin*, 79 T.C. at 347 n.10.

63. *Jacklin*, 79 T.C. at 348.

64. 13 T.C. 1092 (1942).

65. *Jacklin*, 79 T.C. at 348.

66. The *Jefferson* agreement stated that "a sum sufficient, according to the full measure of the standard of living" to which the recipient had been accustomed, would be paid. At that time, because of the recipient's condition of health, $6000 a year was agreed to be sufficient. *Jefferson*, 13 T.C. at 1094–95. *See supra* notes 42–48 and accompanying text.

67. *Jacklin*, 79 T.C. at 351.

68. *Id.* (quoting from paragraph 5 of the *Jacklin* agreement, *supra* note 52).

69. *Id.* at 350.

70. 59 T.C. 97 (1972).

71. *Id.* at 100. *See supra* notes 38–41 and accompanying text.

72. *Jacklin*, 79 T.C. at 351.

The court did observe that such an ambiguous agreement "foments disputes and provides another battlefield on which the warring spouses can renew hostilities."[73] It concluded, however, that the *Jacklin* agreement was not insufficient as a matter of law.[74] If Dewey could establish all the necessary elements under section 71(a)(2), Patience would be required to include the payments in her income, and Dewey would be entitled to a deduction.[75]

III. ANALYSIS

A. *Analytic Problems*

The *Jacklin* court's decision blurs the distinction between alimony payments and voluntary payments. The problem stems from the court's failure to address the underlying legal issue raised by Patience's and Dewey's separation agreement: At what point does a separation agreement become so vague that any payment made pursuant to it is gratuitous or voluntary?[76] If a payment is essentially voluntary[77] it should not come within the alimony inclusion/deduction system.

The courts have not articulated a standard for determining when a payment is voluntary. Logically, a payment should be regarded as voluntary when it is made pursuant to an agreement in which a payor spouse retains excessive control over the amount to be paid.[78] This standard simply ar-

73. *Id.*

74. The case was remanded for decision on the facts. *Id.* at 352.

75. *Id.* at 352.

76. The court did recognize a distinction between payments made pursuant to a written separation agreement and payments made when there is no written agreement reflecting a meeting of the minds. *Id.* at 347. Thus the court implied that there is a point at which there is no "written separation agreement" sufficient for purposes of the inclusion/deduction system. However, it offered no assistance on where this point is.

The concurrence agreed with the majority that the *Jacklin* agreement was legally sufficient. *Id.* at 352 (Whitaker, J., concurring). However, the concurrence argued that agreements that do not provide some mechanism for determining support and that are not enforceable under "general principles of contract law" are not legally sufficient. *Id.* at 352–53. The concurring justice framed his standard in terms of "general principles of contract law" to avoid a conflict with Treas. Reg. § 1.71-1(b)(2)(i) (1954), which provides that a separation agreement does not have to be enforceable in a court of law for purposes of I.R.C. § 71(a)(2). *Jacklin,* 79 T.C. at 352–53 (Whitaker, J., concurring).

77. If a voluntary payment is gratuitous it still does not come within the inclusion/deduction system. However, a gratuitous payment, unlike other voluntary payments, is not included in the recipient's income. I.R.C. § 102(a) (1976). The *Jacklin* court did not address the issue of whether Dewey's payments were gratuitous.

78. The language of the concurring opinion in *Jacklin* supports this standard when it states that "where the language of an agreement is so vague as to indicate there was no meeting of the minds on the amount of support and no basis for determining the nature or extent of the obligation, any payment would be gratuitous." *Jacklin,* 79 T.C. at 353–54 (Whitaker, J., concurring).

ticulates the practical meaning of obligation. If one can choose how much to pay, one is not obligated.

The suggested standard effectuates the legislative purpose for the inclusion/deduction scheme.[79] By permitting a deduction for an obligatory payment, it relieves the payor's financial burden. The payor who has control over the amount of the payment, however, does not need legislative help to avoid an excessive financial burden. The unobligated payor can simply reduce the amount of payment.

Under this standard, a payment made pursuant to an agreement that is enforceable in court may still be voluntary for tax purposes. Most agreements are never taken to court. Payments are made, and amounts are included or deducted on tax returns, based on the amount specified in the agreement. If no amount is specified, the payor spouse retains excessive control over the amount of the payment. If this amount seems unreasonable, the recipient may challenge it in court. If the recipient does not challenge the payment, however, and includes it in his or her income,[80] it would be difficult for the Internal Revenue Service to challenge the payor's choice.

Under the suggested standard, a payment made pursuant to the separation agreement in the *Jacklin* case was voluntary. Whether or not the *Jacklin* agreement was enforceable in state court,[81] Dewey could choose how much to pay unless Patience was willing to go to court. Thus Dewey retained excessive control over the amount of payment.

79. *See supra* text accompanying notes 9–11.

80. Before the payor spouse can deduct an alimony payment under I.R.C. § 215 (1976) the recipient spouse must include the payment in her or his income.

81. In order for an agreement to be binding, the content of that agreement cannot be unduly uncertain or indefinite. *See* RESTATEMENT (SECOND) OF CONTRACTS § 37 (1981). Courts do not, however, favor the destruction of contracts; thus, courts often construe them so as to "carry into effect the reasonable intention of the parties, if that can be determined." Mag Constr. Co. v. McLean County, 181 N.W.2d 718, 721 (N.D. 1970). Courts have found less room for implication in cases where a term has been referred to but still left indefinite. *See* Flemming v. Ronson Corp., 107 N.J. Super. 311, 258 A.2d 153 (Law Div. 1969), *aff'd*, 114 N.J. Super. 221, 275 A.2d 759 (App. Div. 1971); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 40 (3d ed. 1957).

In the process of negotiating an agreement, parties often leave the amount of compensation to be settled by future agreement or by some other specified method. This is true both of agreements for services and of those for the purchase and sale of goods. If the parties provide a practicable objective method for determining the amount of compensation, not leaving it to the future will of the parties themselves, the agreement is sufficiently definite and certain to be an enforceable contract. 1 A. CORBIN, CORBIN ON CONTRACTS § 97, at 424–25 (1963). The amount of compensation is sufficiently definite for the agreement to be enforceable if the parties specify a practicable method by which a court can determine the amount without any new expression by the parties themselves. *Id.* § 98, at 433–34.

The *Jacklin* agreement, by requiring that Dewey pay Patience an amount sufficent to allow her to achieve her prior standard of living, arguably provided a method by which the court could calculate Dewey's required payment. By consulting the parties' financial records, the court should have been able to arrive at a figure without any additional expression by the parties. Thus, under general contract doctrine, the *Jacklin* agreement was probably enforceable.

The *Jacklin* court failed to confront the issue of voluntariness by refusing to require a minimum support payment for a "sufficient" written separation agreement.[82] Instead, the *Jacklin* court relied on the *Jefferson v. Commissioner* decision[83] to support its position.[84] Unlike the *Jacklin* agreement,[85] however, the *Jefferson* agreement clearly established a minimum support payment of $6000.[86] The payor spouse did not have control over the decision to pay at least this amount.[87]

The *Jacklin* court might also have relied on the regulations interpreting section 71(a)(2).[88] Under these regulations,[89] alimony payments are includable in the recipient spouse's gross income "whether or not the agreement is a legally enforceable instrument."[90] This provision, however, arguably was aimed at avoiding aberrations in state contract law that could upset the uniformity of the federal tax system.[91] Requiring a dollar amount does not thwart this purpose.[92] Without some minimum criteria for a "sufficient" separation agreement, the statutory language requiring an agreement is meaningless.[93]

B. Practical Problems

Two major practical problems flow from the *Jacklin* decision. The first

82. *Jacklin*, 79 T.C. at 352.

83. 13 T.C. 1092 (1949).

84. *Jacklin*, 79 T.C. at 349–50.

85. The *Jacklin* agreement required the payment of "supplementary funds . . . necessary to sustain a standard of living equivalent to that which obtained before the separation." *See supra* note 52.

86. *See supra* note 45.

87. *Jefferson*, 13 T.C. at 1098–99.

88. The concurrence, with these regulations in mind, argued that the difference between voluntary and obligatory payments, for purposes of the inclusion/deduction mechanism, is whether they are made pursuant to a separation agreement that is enforceable under "general principles of contract law." *Jacklin*, 79 T.C. at 352–54 (Whitaker, J., concurring); *see supra* note 76.

89. Treas. Reg. § 1.71-1(b)(2)(ii) (1954).

90. *Id.* It could also be argued that by not including the words "in discharge of a legal obligation" in § 71(a)(2), as it did in § 71(a)(1), Congress was reinforcing the applicability of § 71(a)(2), regardless of whether the separation agreement is enforceable under state law. Engelhardt v. Commissioner, 58 T.C. 641, 646 (1972).

91. Congressional intent may be indicated by a statement in the Senate Report on the Revenue Act of 1942, which provided that uniformity of treatment of alimony payments was intended "regardless of variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony." S. Rep. No. 1631, 77th Cong. 2d Sess. 83 (1942), *reprinted in* 1942-2 C.B. 568. *See also* Taylor v. Campbell, 335 F.2d 841, 846 (5th Cir. 1964) (holding that the "vagaries of Texas marital law cannot operate to defeat the obvious intent of the statute that it be uniformly applied").

92. *Cf. Jacklin*, 79 T.C. at 354 (Whitaker, J., concurring).

93. It is a rule of statutory construction that, if it does not destroy the sense or effect of the law, significance and meaning should be accorded every phrase and word in a statute. 2A C. Sands, Statutes and Statutory Construction § 46.06 (4th ed. 1973).

is the danger of collusion.[94] A *Jacklin*-type agreement allows the parties to adjust the amount of payment annually and thus offers opportunities to reduce the taxes paid by the payor spouse. For example, a prosperous payor and a willing recipient can cooperate for mutual benefit.[95] Under a *Jacklin*-type agreement they can agree that in the payor's high-income years, more support will be paid than the recipient needs. In exchange, the recipient will accept less support in the payor's low-income years, when the section 215 deduction will be less useful to the payor.

Such an arrangement would be less workable under a standard separation agreement.[96] Any payments in excess of the specified amount would be voluntary and thus nondeductible by the payor.[97] Such an arrangement under a *Jacklin*-type agreement would be easily workable and potentially profitable.[98] Congress clearly did not have this tax-evading device in mind when it created the inclusion/deduction mechanism.

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94. Professor Bittker states that with the advent of the joint return, "the danger of collusive arrangements evaporated because no informal split of income between spouses could produce a lower tax than a joint return." 3 B. BITTKER, *supra* note 9, at 77-5 to -6 (footnote omitted). While it is true that no split can do better than a joint return, if parties want to separate, an arrangement that allows flexibility from year to year for payments would in many cases result in lower taxes than a traditional separation agreement.

95. By cooperating, the recipient can bargain for a larger amount of support and the payor spouse will be able to afford it, because less will be paid in taxes.

96. Once the IRS discovered such an arrangement under a standard separation agreement it would clearly be unworkable. However, such an arrangement might not be discovered as long as the recipient was willing to declare all payments that the payor deducted.

97. Van Vlaanderen v. Commissioner, 175 F.2d 389, 390 (3d Cir. 1949).

Such an arrangement, made under a *Jefferson*-type agreement, would probably be workable. *See* Jefferson v. Commissioner, 13 T.C. 1092 (1949). The opportunity provided by the "for any other reason" language in the *Jefferson* agreement seems virtually unlimited. *See supra* note 45. The requirement of a fixed minimum payment, however, would reduce the profitability of such an arrangement.

98. Assume the following facts:

Year	PGI*	EID*
1	80,000	15,000
2	80,000	10,000
3	40,000	40,000

Assume also that the recipient has no income other than alimony and has $1700 of itemized deductions, or just enough to offset his or her zero bracket amount. Under a standard separation agreement with a provision for $25,000 per year alimony, the two parties' total tax, over the three-year period, would equal $49,932:

Year	PGI*	Alimony	EID*	PTI*	Payor's Tax	RGI*	Recipient's Tax
1	80,000	25,000	15,000	40,000	13,752	25,000	6,652
2	80,000	25,000	10,000	45,000	16,224	25,000	6,652
3	40,000	25,000	40,000	0	0	25,000	6,652

Under a *Jacklin*-type agreement, the parties could pay $6924 less over a three-year period:

Second, *Jacklin*-type agreements require unwieldy calculations. These calculations will waste everyone's time: the parties', the IRS', and possibly the courts'. Divorce tax lawyers will have nightmares trying to advise clients how much alimony to pay under a *Jacklin*-type agreement. Payments of any size will be open to challenge.[99] In effect, the Tax Court will have the responsibility of setting the amount of annual deductions.

The IRS, too, will be in an awkward position.[100] Most alimony-tax disputes are settled by the IRS at desk audits. To settle such a dispute under a *Jacklin*-type agreement, the IRS will have to determine how much money is necessary to support the recipient at the level to which she or he was accustomed prior to the separation. When a couple cannot agree, the family court,[101] not the IRS or the Tax Court,[102] generally makes this type of determination.

Year	PGI*	Alimony	EID*	PTI*	Payor's Tax	RGI*	Recipient's Tax
1	80,000	40,000	15,000	25,000	6,652	40,000	13,752
2	80,000	35,000	10,000	35,000	11,302	35,000	11,302
3	40,000	0	40,000	0	0	0	0

*Legend: PGI—Payor's Gross Income;
EID—Excess Itemized Deductions;
PTI—Payor's Taxable Income;
RGI—Recipient's Gross Income.
All figures are based on I.R.C. § 1(d)(1) (1982).

Under any type of agreement, the initial problem for the IRS in preventing such arrangements would be discovery. *See supra* note 96. Under a standard agreement, once the arrangement is discovered it could be stopped. Van Vlaanderen v. Commissioner, 175 F.2d. 389 (3d Cir. 1949). However, under a *Jacklin*-type agreement, discovery would merely be the first step in a long court struggle in which the IRS would be faced with challenging the parties' combined argument that the amounts paid were all the recipient needed in that particular year. Although in an obvious case the IRS would probably win, the struggle involved in arriving at the proper support figure would waste both the court's and the government's time. *See infra* text accompanying notes 99–103.

99. The amount of each year's (or month's) alimony payment could become a weapon in the hands of either spouse. The recipient, especially, would be susceptible to the payor spouse's reduction of the payments because the recipient would not know at what point a court challenge would be effective and therefore economically profitable.

100. In this situation, the IRS position is already complicated by the potential for whipsaw. *Final Report, Special Committee on Whipsaw, Section of Taxation, American Bar Association,* 30 TAX LAW. 127, 141 (1976). This potential exists "whenever two (or more) taxpayers have adverse interests in the manner in which a specific item or transaction is taxed." *Id.* at 127. *See* 3 B. BITTKER, *supra* note 9, at 77-23 to -24.

101. To determine the needs of the recipient, domestic relations courts consider four main factors:

> 1. The resources of the recipient spouse . . . .
> 2. The earning capacity of the recipient spouse and the extent of his or her opportunity to work.
> 3. The age, health, and general physical condition of the parties.
> 4. The social standing, needs, comforts, and luxuries of life reflected in the standard of living the recipient spouse would have probably enjoyed had it not been for the enforced separation.

White & Stone, *Consumer Unit Scaling as an Aid in Equitably Determining Need Under Maintenance and Child Support Decrees,* 13 FAM. L.Q. 231, 232–33 (1979) (footnotes omitted).

If such a dispute reaches the Tax Court, considerable time and effort will be required to resolve the issue.[103] Moreover, whether made by the parties, the IRS, or the court, this determination must be reconsidered each year because of fluctuations in the needs of the recipient spouse.

The *Jacklin* majority foresaw the practical problems created by its decision[104] but was persuaded by the *Bogard v. Commissioner* court's specter of a trap for the unwary[105] to hold that the agreement was not legally insufficient.[106] Ironically, in the analogous area of child support, just such a trap has been upheld. In *Commissioner v. Lester,*[107] the Court held that payments made pursuant to an agreement which failed to specify an amount for child support would be treated as alimony.[108] The Court stated that even " 'a sufficiently clear purpose' on the part of the parties" was not enough to exclude the payments from the recipient's income where the agreement failed to state that the payments were for child support.[109] The courts have not always been so concerned about creating traps for the unwary.

Moreover, the policy reasons that compelled the *Bogard* decision are inapplicable here.[110] It is easy to believe that parties preparing a separation agreement could forget to include, or not see the necessity of including, a formal statement that they are living apart. Similar non-tax, personal reasons, however, do not justify a separation agreement that fails to specify a dollar amount for support and that may be unenforceable as a contract.

Parties may want to use a *Jacklin*-type agreement to avoid specifying a

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102. Such a determination is difficult for the experienced domestic relations court. *Id.* at 234. It would be more difficult for the inexperienced Tax Court.

103. In fact, one of the reasons for encouraging the use of separation agreements between parties is to "prevent protracted litigation of spousal rights." Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law,* 17 J. FAM. L. 711, 717 (1978–79) (citing the UNIF. MARRIAGE AND DIVORCE ACT § 306 (1973).

104. *Jacklin,* 79 T.C. at 351.

105. 59 T.C. 97, 101 (1972).

106. *Jacklin,* 79 T.C. at 350–51.

107. 366 U.S. 299 (1961).

108. *Id.* at 301.

109. *Id.* at 305.

110. In fact, the *Bogard* court stated that:

> Logically, it appears Congress was interested in a clear statement in written form of the terms of support where the parties are separated. In this manner it is administratively convenient for the Commissioner to apprise himself of the amount of gross income to the wife and the corresponding deduction allowable to the husband.

Bogard v. Commissioner, 59 T.C. 97, 101 (1972).

The court then proceeded in the same paragraph to explain why, because an actual separation was required, a statement of separation was supererogatory. *Id.*

dollar figure when its components are unknown or highly variable.[111] Nevertheless, a nonspecific agreement is a poor solution because it leaves the recipient spouse in a vulnerable position.[112] The better solution is to search for innovative ways of fixing the amount of alimony while still allowing for flexibility.[113] Two other possible reasons for entering into such an agreement are inequality of bargaining power and collusion.[114] Both are against public policy. The tax system should not encourage such agreements by finding them sufficient to establish a deduction for the payor. On examination, there are no legitimate non-tax reasons for entering into a separation agreement which does not specify a dollar amount.

C. *Proposal*

The major deficiency of the *Jacklin* court's decision is its failure to specify any criteria for measuring the sufficiency of a written separation agreement. The court could have specified two different criteria.

One possibility requires that the separation agreement be enforceable under "general principles of contract law."[115] This requirement would give meaning to the language of section 71(a)(2);[116] but it would not solve the problem of voluntariness.[117] Because a *Jacklin*-type agreement may be enforceable under general contract law,[118] the danger of collusion and the practical problems considered above would still exist.

A better alternative would require the separation agreement to include a dollar figure for support. This could be either a flat dollar amount or an amount tied to other clearly articulated variables. Possibilities include tying the support figure to the payor's income, the recipient's income, health care costs, rent payments, or the inflation rate.[119] Inclusion of one of these objective variables will not affect the agreement's enforceability

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111. It appears, from the language of the *Jacklin* agreement, that the parties were unsure of the recipient's future employment. *See supra* note 52.

112. *See supra* note 99.

113. In the *Jacklin* case, if the problem really was the uncertainty of the recipient's future employment, the amount of alimony could have been set at X dollars minus any salary or wages the recipient received. *See infra* note 119.

114. *See supra* note 98. Under the facts outlined in note 98, the recipient's tax under a standard separation agreement is $19,956 for a three-year period. By allowing the payor spouse to "dump" income on the recipient in certain years, the recipient's tax is increased to $25,054 over the same three-year period. Unless the parties are working together and splitting their profits, this is not an advantageous agreement for the recipient.

115. *Jacklin*, 79 T.C. at 353–54 (Whitaker, J., concurring). *See supra* notes 76, 81 & 88.

116. *See supra* note 93 and accompanying text.

117. *See supra* text accompanying notes 73–79.

118. *See supra* note 81.

119. The IRS has recognized the sufficiency of agreements which provide for payments subject to annual inflation adjustments. Rev. Proc. 82-53, 1982-2 C.B. 842.

under state contract law.[120] This solution would solve the conceptual and practical problems created by the decision.

IV. CONCLUSION

The *Jacklin* court blurred the distinction between a voluntary payment and an obligatory one by holding that an agreement "not wholly without some standard" for maintenance is sufficient as a matter of law.[121] This distinction is fundamental to the inclusion/deduction scheme. The decision has also created immense practical problems. Because there is no legitimate benefit from entering into a *Jacklin*-type agreement, the court should not encourage such agreements. The court should have imposed a dollar figure requirement for sufficiency under section 71(a)(2).

Kay Brown

120. Generally, Washington state courts have not questioned the propriety of escalator clauses in spousal maintenance awards. *See* Verde v. Verde, 78 Wn. 2d 206, 471 P.2d 84 (1970) (escalator clause based on percentage of income increases); Jensen v. Jensen, 54 Wn. 2d 473, 341 P.2d 882 (1959) (maintenance payment calculated as a percentage of monthly income).

121. 79 T.C. at 351.